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"SUBSTITUTED SERVICE OF PROCESS UPON MARRIED WOMEN."

Two recent lower court decisions in this state, together with a statement by Mr. Burks in his Pleading and Practice, have raised the question of the validity of substituted service upon a married woman by delivery to her husband or by posting at her front door.

Mr. Burks, in his work on Pleading and Practice, p. 301, says, "Process against a married woman must be served personally. The provisions of the statute for the service of process must be substantially complied with, and the method of service can not be otherwise than is there prescribed. The Virginia statute allowing a substituted service was enacted at a time when a married woman could not be sued alone at law, and has not been altered since her disabilities were removed, and while it is true that this would make no difference if the language of the statute were broad enough to cover the case, and that § 5, clause 13 of the Code provides that 'a word importing the masculine gender only, may extend and be applied to females as well as males,' still there is no authority for substituting 'husband' for 'wife' nor for making the famliy her family when the husband is still alive and the head of the family. The substituted service is only allowed, under the statute, if *he* be not found at *his* usual place of abode, and the copy is to be delivered to *'his wife,'* or to a member of *his* family. Such language seems to be wholly inapt to describe substituted service on the wife, and to hold it applicable to her would not be a substantial compliance with the statute. Furthermore there may be good reasons for not allowing such service."

In Union Bank of Winchester *v.* Harriet E. Ferguson, 2 Va. Law Reg. N. S., p. 338, Judge Harrison, of the Corporation Court of Winchester, after setting out in full, the foregoing section from Burks' Pleading and Practice, held valid, the

following return: "Not finding Hattie E. Ferguson or any member of her family at her usual place of abode upon whom service could be had, executed, etc., by posting a copy of the within Notice of a Motion for a Judgment on the front door of her residence, No. 614 North Lombard St. that being her usual place of abode." It will be observed that in this case there was no attempt to serve this notice upon her husband or any other member of her family, etc.

In Robert Payne *v.* Carrie L. Lucas, commented upon in 1 Va. Law Reg. N. S., p. 787, Judge Fishburne, of the Circuit Court, of Albemarle County, held a return, "not finding Mrs. Carrie L. Lucas at her usual place of abode, executed, etc., by delivering a copy of the within Notice to E. D. Lucas, her husband, and explaining the purport thereof to him," insufficient.

Section 3207, Code of Virginia is as follows: "A notice, no particular mode of serving which is prescribed, may be served by delivering a copy thereof in writing to the party in person; or, if he be not found at his usual place of abode, by delivering such copy and giving information of its purport to his wife or any person found there, who is a member of his family, and above the age of sixteen years; or, if neither he nor his wife, nor any such person be found there, by leaving a copy posted at the front door of said place of abode." Under § 3224 of the Code a writ of summons may be served as a notice is served under § 3207.

Here are given three entirely different modes of serving process upon natural persons, but unfortunately the last two have both been termed "substituted" service and the broad distinction between them, is often lost sight of. In Union Bank of Winchester *v.* Ferguson, the sheriff's return showed that he adopted the third method prescribed by the statute, while in Payne *v.* Lucas, the second method was resorted to. Is there any distinction in the legal effect of these two independent "substituted" services of process upon married women? In the section quoted, Mr. Burks makes no distinction between the two; yet, as Judge Harrison points out, his argument is based entirely upon the second mode of service, without reference to the third. In Union Bank of

Winchester *v.* Ferguson, where the Notice was posted on the front door of Mrs. Ferguson's usual place of abode, criticising this section from Burks, Judge Harrison says, "In the next place he is in error with reference to the Virginia statute. By the act of 1899-1900, page 1240, it is enacted, 'A married woman may contract and be contracted with, sue and be sued, in the same manner, and with the same consequences as if she were unmarried, whether the right or liability asserted against her shall have accrued before or after the passage of this act.' After the passage of this sweeping removal of a married woman's disabilities, the statute acts 1902-04, page 632, re-enacted § 3207 of the Code providing for substituted service. Thus the statute for substituted service was re-enacted after the statute which provides that a married woman might be sued in the same manner and with the same consequences as if she were unmarried." In conclusion, the Judge holds: "That the law as to the service of process on married women is identical with that as to unmarried women, and that therefore, posting the notice on the front door of the usual place of abode of a married woman is as valid as if she were unmarried."

In Payne *v.* Lucas, however, the notice was executed by delivering a copy to the husband, the wife not being found at her usual place of abode, etc., and there was no posting on her front door. Deciding the case upon this point alone, Judge Fishburne followed the reasoning of Mr. Burks, and held this service invalid.

But why should there be this distinction? The true reason seems to be that in the case of posting the notice on the front door, "he" certainly can mean "she" and this case is clearly within the letter of the statute, while as to the substituted service upon the wife by delivering a copy to her husband, this is just as clearly without the letter of the statute, and furthermore, Mr. Burk's argument that it is also without the spirit thereof, is convincing. So, in conclusion, we can sum up the entire question in Judge Harrison's own terse expression: "As to the service of process on married women, the law is the same as if she were unmarried."

Luray, Virginia. R. LAUCK BENSON.

On the same subject, Substituted Service upon Married Women, we print the following letter from Judge T. W. Harson of Winchester:

"I read the annotation in Volume 2 N. S. page 343 to the case of Union Bank *v.* Ferguson in regard to the service of process upon a married woman.

"Your note seems to imply that I held, in my opinion in that case, that service upon a husband would be a good substituted service on a wife. Such was not the case, however, and such is not my view of the law.

"The substituted service before the Court in the case named was service by posting, which was strictly in conformity with the statute authorizing substituted service if the statute is applicable to married women.

"The sole contention turned upon the question as to the application of this statute in the case of married women. I understand Judge Fishburne held that a return of this character was invalid:

'Not finding Mrs. Carrie L. Lucas at her usual place of abode, executed by delivering a copy of the within notice to E. D. Lucas, her husband, and explaining the purport thereof to him.'

"I concur with Judge Fishburne, that the return in this case was insufficient because the terms of the statute do not authorize service on the husband as a substituted service on the wife. But because a married woman has no wife does not make the statute inapplicable to a married woman when the other requirements of the statute are complied with.

"The same course of reasoning would make the statute inapplicable to an unmarried woman as well as to an unmarried man. An unmarried woman has no wife, nor has an unmarried man, and yet when the requirements of the statute are complied with, admittedly, substituted service is applicable to them.

"I believe a married woman can have a family, within the meaning of the statute. In various Virginia cases, tho' not directly by the Supreme Court of Appeals of Virginia, it has been held that a married woman can be the head of a family, within the meaning of the Homestead Exemption Law.

"I do not believe that a person must be the head of a family in order that service of process on a member of the family shall be valid. The few cases I have been able to examine on this point do not so hold. If, however, I am wrong

about this, still, as a married woman can be the head of a family for the purposes of claiming the Homestead Exemption, there seems to be no reason why she might not also be the head of a family for the purpose of this statute on substituted process.

"If I am still wrong about this, there is still no reason why the substituted service of process by posting should not be valid.

"If a married woman cannot be the subject of substituted service, then there are many instances of invalid judgments and decrees in this State. If other text writers had agreed with Mr. Burks, it is inconceivable that in discussing this subject they did not call attention to it. The alteration of the statute law could not cure the defects of these judgments and decrees."

Respectfully,

T. W. HARRISON.

Editor's Note.—While there are two methods of substituted service, that by delivery to the wife or member of the family and that by posting, which can be distinguished by the steps to be taken to obtain valid service, there can be no distinction as to the purpose and effect of service in the two cases, which is to bring the defendant into court and to charge him with notice of proceedings therein. In addition to being similar in their purpose and effect, the two provisions in the Code are similar in their wording and for that reason alone an effort should be made to construe them alike. One provision reads by delivering the copy "to his wife or any person found there, who is a member of his family," and the other reads "if neither he nor his wife nor any such person be found there, by leaving such copy posted at the front door." Two provisions of a statute, so similarly worded, placed in the same paragraph and relating to the same subject-matter, should be read together and harmonized in order to avoid giving the words of the legislature conflicting, if not absurd, meanings. There is every reason to believe that if the legislature meant to permit the service of process upon a married woman by posting it at her front door, it also meant to permit service upon her by delivery to her husband or a member of her family.

Although the courts may not presume an intention of the legislature at variance with the clearly expressed meaning of the statute, yet, where the intention of the legislature is apparent from the particular statute, other statutes relating to the same subject-matter or from the reason and purpose of its enactment, they may, in order to effectuate such intentions, give the wording of the statute a meaning to comport therewith. If there is a clear intention of the legis-

lature, in this instance, to use the word "wife" to mean husband, the courts are justified in giving the word such meaning. "The legislature is presumed to mean what is plainly expressed, and consequently, where a statute is in plain and unambiguous terms, there is no necessity for construction—the province of construction lies wholly within the domain of ambiguity. Where, however, the words of a statute do not make clear the meaning of the legislature, the court must resort to construction, and may go to the extent of expunging, inserting or changing the very words used by the legislature." 1 Va. Law Reg., N. S. 512.

If in the construction of § 3207 of the Code, its own particular wording alone does not justify the conclusion that the legislature intended to use the word "wife" as husband, when read in connection with § 5, which provides "A word embraced in the masculine gender only, may extend and be applied to females as well as males," and the numerous sections of the Code relating to the rights and capacities of married women, and bearing in mind the intent, reason and purpose of them all, such construction is justified, if not necessary to avoid giving absurd consequences to its provisions.

It seems that the conclusion reached in Payne *v.* Lucas was based upon the fact that § 3207 was enacted prior to the Married Women's Act. It is true that a statute is to be construed with reference to circumstances and conditions at the time of its enactment. At the time of the enactment of § 3207, a married woman could not have been sued alone, and therefore, such section, could not because of such disability be construed to apply to her. Since, however, the subject-matter of § 3207 has been changed to that extent by the removal of the disability of a married woman to be sued, which necessarily implies that she is made subject to service of process. A statute is to be construed with reference to its present as well as its past subject-matter, otherwise, the law would be inapplicable to circumstances arising from change and progress. There are two reasons to believe that § 3207 is not merely antiquated legislation, (1) because it has been substantially reenacted in the Codes; and, (2) because an act on the statute books, which the legislature has not amended or repealed, is presumed to receive its continuous approval, especially where it is as ever present in the legislative mind as is § 3207.

A statute is to be construed with reference to its judicial and administrative construction. Where the lower courts, sheriffs and other officers of the state have for a long time construed a statute a certain way, when the statute is before the highest court of the state for construction, such court should, unless the legislative intent is clearly otherwise, follow the construction given by the lower courts and administrative officers. This rule has special force where

property rights have accrued and where titles have become settled and such rights and titles would be defeated or disturbed by a change in construction. It seems that the lower courts and officers making service have, with the exception of Payne *v.* Lucas, given § 3207 of the Code the construction, that service may be had upon a married woman in the same manner as upon her husband. At this late day it would be unsafe to construe the statute otherwise.

The construction of § 3207, which is most reasonable and which from the reading of the various other provisions of the Code relating to married women is the evident intent of the legislature, is that service may be made upon a married woman the same as it may be made upon a married man. This is contrary to the conclusion arrived at by Mr. Burks. It is possible that he is inclined to a stricter construction of § 3207, in order to caution lawyers following his book against taking any wrong step in bringing a married woman into court. And, while concurring with the holding in Union Bank of Winchester *v.* Ferguson, the conclusion here reached, that process may be served upon a married woman as upon a married man, differs from a statement in the opinion, that "as to the service of process upon married women, the law is the same as if she were unmarried," which is justified by presuming that the legislature has in various sections of the Code attempted to put married women upon an equal footing with unmarried women, but not as pointed out above by the words of § 3207 itself. It has been often stated by the courts and textwriters, that it is the intention of the legislature to give married women all the capacities of unmarried women. This does not mean that she may not have even more rights and capacities than an unmarried woman. Because she is a wife and has a husband, she has dower rights, while an unmarried woman has none, and because she has a husband, who is a member of her family, does she not differ from an unmarried woman in that service may be made upon her husband as a member of her family? She has a family, and, even if "wife" can not be construed to include husband, "family" can.

The conclusion that service may be made upon a married woman the same as upon a married man undoubtedly gives a very broad construction to the words of § 3207, but is it not justified by necessity and the reasons set out above?

T. B. B.